Supreme Court, U.S.
FILED
MAY 8 1992
OFFICE OF THE CLERK

(4)

No. 91-1501

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

POMINI FARREL S.p.A. and POMINI, INC.,
Petitioners,

v.

FARREL CORPORATION and
UNITED STATES INTERNATIONAL TRADE COMMISSION

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Federal Circuit

---

REPLY BRIEF FOR PETITIONERS

Edward Kancler
Kevin H. Young
Mark A. Phillips
BENESCH, FRIEDLANDER,
COPLAN & ARONOFF
1100 Citizens Building
850 Euclid Avenue
Cleveland, Ohio 44114
(216) 363-4500

Jerrold J. Ganzfried
Counsel of Record
HOWREY & SIMON
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 783-0800

Tom M. Schaumberg
V. James Adduci, II
ADDUCI, MASTRIANI, MEEKS & SCHILL
1140 Connecticut Avenue, NW
Washington, DC 20036
(202) 467-6300

Attorneys for Pomini Farrel
S.p.A. and Pomini, Inc.

TABLE OF CONTENTS

Table of Authorities ii

I. This Case Does Not Implicate A "Waiver" Of The ITC's Jurisdiction 3

II. Treaty Obligations Require The U.S. To Honor International Arbitration And Forum Selection Provisions 4

III. The ITC Does Not Lack Authority To Consider Meritorious Defenses 5

Conclusion 8

TABLE OF AUTHORITIES

CASES

The Bremen v. Zapata Off-Shore Co.,
407 U.S. 1, 4 (1972) 5

In re Certain Fluidized Bed Combustion Systems,
Inv. No. 337-TA-213, USITC Pub. 1752
(Sept. 1985) 2, 3

Gilmer v. Interstate/Johnson Lane Corp.,
111 S. Ct. 1647 (1991) 4

Mitsubishi Motors Corp. v. Soler
Chrysler-Plymouth, Inc., 473 U.S.
614, 630-31 (1985) 2, 3, 5

Young Engineers, Inc. v. USITC,
721 F.2d 1305, 1315 (Fed. Cir. 1983) 4

STATUTES

Section 337 of the Tariff Act of 1930, as
amended, 19 U.S.C. § 1337 ..... 3, 6

19 U.S.C. § 1337(b)(1) 6

19 U.S.C. 1337(c) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1501

POMINI FARREL S.p.A. and POMINI, INC.,
Petitioners,

v.

FARREL CORPORATION and
UNITED STATES INTERNATIONAL TRADE COMMISSION

On Petition For A Writ of Certiorari To The United States Court of Appeals For the Federal Circuit

---

REPLY BRIEF FOR PETITIONERS

The petition in this case poses momentous questions relating to the enforceability of international commercial agreements that designate arbitration as the sole forum for resolving disputes between the parties. The prevalence of such arbitration provisions magnifies the impact of these issues for all participants in international trade. In opposition, each respondent in its own way recasts the record in this case inaccurately in order to diminish the significance of the questions presented. When the record is viewed accurately -- to reflect the issues actually decided by the International Trade Commission ("ITC") and reversed by the court of appeals -- the importance of the questions presented and the need for this Court's immediate review remain clear.

The briefs in opposition go to great lengths to avoid the key issues in the case. For example, respondent Farrel has no answer to the plain inconsistency between the decision below and the legal imperatives of the multilateral treaty in which the United States obligated itself to recognize arbitration agreements in international transactions. The New York Convention provides that "[e]ach Contracting State shall recognize" arbitration agreements. Lacking any response, Farrel simply ignores the treaty.

As a further example, the ITC's brief offers no support for the decision below. Instead, the ITC seeks to minimize the importance of the Federal Circuit's opinion by suggesting that parties to arbitration agreements rarely commence proceedings before the ITC. ITC Br. in Opp. 8. But, until the decision of the court of appeals in this case upset well-established and longstanding principles, the ITC consistently honored and enforced litigants' agreements to arbitrate disputes. The ITC firmly established that principle in *In re Certain Fluidized Bed Combustion Systems*, Inv. No. 337-TA-213, USITC Pub. 1752 (Sept. 1985), by faithfully applying the teachings of this Court in *Mitsubishi*. For the ITC now to say that parties to arbitration agreements have rarely come before the Commission since *Fluidized Bed* is simply to acknowledge that the law on this issue was firmly settled. Unless this Court grants review and reverses the decision below, the law in this critical area of international trade will be settled no longer.

Similarly unavailing is the ITC's suggestion that this Court's review should await the conclusion of the newly-resumed Commission proceedings on remand. ITC Br. in Opp. 9. In fact, the central focus of the petition is

whether the ITC should conduct any proceedings at all in this case. The resumption of proceedings violates the very rights under the arbitration agreement and under international treaties that Pomini seeks to vindicate. Just as in the context of double jeopardy claims and claims of immunity from trial, the deprivation of a right not to be subjected to a particular proceeding cannot be cured by *post hoc* review.

Accordingly, this Court's review is warranted at this time to rectify the Federal Circuit's departure from the principles set forth in *Mitsubishi*, principles that have signal importance in international commercial transactions and that will be adversely affected to an extraordinary extent because of the Federal Circuit's unique jurisdiction in international trade.

I. THIS CASE DOES NOT IMPLICATE A "WAIVER" OF THE ITC'S JURISDICTION

Both respondents mistakenly suggest that enforcement of the parties' selection of arbitration as the sole forum for resolving disputes is tantamount to a "waiver" that "divests" the ITC of all jurisdiction. *See* Farrel Br. in Opp. 7; ITC Br. in Opp. 11-12 & n. 4. These contentions ignore the fact that Farrel specifically requested the ITC to "self-initiate an investigation" in order to protect "the public interests." Pet. App. A53. The ITC expressly declined that request "because of policy considerations" (although noting that it possessed "authority to institute an investigation on its own initiative"). *Id.* at A54, *quoting Fluidized Bed*, USITC Pub. 1752 at 10-11. Petitioners do not challenge the ITC's authority (or jurisdiction) to conduct proceedings under Section 337 on its own initiative where, in its view, the public interest warrants.

In such circumstances, both arbitration proceedings and agency proceedings may go forward just as described in this Court's dictum in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647 (1991).

But that situation does not exist here. Because the ITC has already determined that the public interest does not warrant proceedings on Farrel's allegations, the decision of the court of appeals requires agency resolution of "essentially private rights." *See Young Engineers, Inc. v. USITC*, 721 F.2d 1305, 1315 (Fed. Cir. 1983); *see also* Pet. 19 & n. 8. The decision below holds that those private rights must be adjudicated by the ITC despite the parties' agreement to resolve all disputes in arbitration. The schism could not be clearer between the judgment below and the national policy favoring arbitration, a policy to which the United States has committed itself by treaty and statute and which this Court has consistently upheld.

II. TREATY OBLIGATIONS REQUIRE THE U.S. TO HONOR INTERNATIONAL ARBITRATION AND FORUM SELECTION PROVISIONS

Respondent Farrel's principal contention in opposition to the petition is that the pendency of arbitration proceedings necessarily excises from the case any issue of enforceability of the compulsory arbitration provision. Farrel Br. in Opp. 4 & n. 2. That contention fundamentally misperceives the nature of an agreement to arbitrate. This Court's decisions make clear that a compulsory arbitration provision constitutes the selection of a particular forum and mode for dispute resolution. When one of the parties subsequently resorts to a forum not specified in the agreement the other party is deprived of its contractual rights. This is so whether the

noncontractual forum is invoked **in addition to** arbitration or **instead of** arbitration. In either event, the contractual selection of arbitration as the sole means of dispute resolution has been dishonored.

For this reason, it was of no consequence in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 4 (1972), that litigation was pending in the forum specified in the contract; when one party instituted additional proceedings in another jurisdiction, this Court held that the contractual choice-of-forum provision required that such additional proceedings cease. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630-31 (1985), the pendency of arbitration proceedings in Japan -- as specified in the contract -- did not deter this Court from holding that the commencement of additional litigation in the United States violated the agreement between the parties.

The circumstances of this case make the need for review even more pressing. Arbitration hearings in Geneva, Switzerland have concluded and the matter is pending before the arbitrators for decision. In the meantime, proceedings before the ITC have resumed. Unless this Court grants the petition and reverses the decision below, the ITC will be required to conduct redundant proceedings, in violation of United States treaty obligations and in violation of the contractual rights of the parties.

III. THE ITC DOES NOT LACK AUTHORITY TO CONSIDER MERITORIOUS DEFENSES

Both respondents attempt to obscure the importance of this case by pointing out that the court of appeals

"declined to decide whether the Commission may refuse to initiate an investigation on the basis of the existence of an arbitration agreement." ITC Br. in Opp. 9; *see* Farrel Br. in Opp. 11; Pet. App. A13 n. 6. The suggestion is that the ITC could avoid the absurd result in this case by terminating proceedings at an even earlier point, *viz.*, prior to commencing an investigation.

Under the decision of the court of appeals, this safety valve is illusory. The stated basis for the decision below is that the ITC lacks authority to terminate an investigation because Section 337(c) provides that "[t]he Commission shall determine, with respect to each investigation conducted by it under this section, whether or not there is a violation of this section . . . ." 19 U.S.C. § 1337(c). In the court's view, the statutory imperative "shall" precludes the ITC from considering Pomini's equitable defense of arbitration until after a determination is reached on the merits. If that is so, then the Commission similarly would have no discretion in deciding whether to commence an investigation in the first place, since Section 337(b)(1) provides that "[t]he Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative." 19 U.S.C. § 1337(b)(1).

Where Congress employed the same imperative ("shall") in both subsections of the statute, it must be presumed that the word has the same meaning in each iteration. Under the decision below, therefore, the filing of a complaint automatically obliges the ITC to investigate, to conduct proceedings "on the record after notice and opportunity for a hearing" subject to judicial review, and to determine whether a violation has occurred. 19 U.S.C. 1337(b)(1) and (c). Under the decision below,

all of this is mandatory no matter how insubstantial, frivolous or deficient the complaint and without regard to the existence of valid defenses. In short, the resources of the ITC would be entirely at the mercy and whim of complainants.

The irony and injustice of this reading of the statute is evident in the record of this case. As the opinions of the ITC and the court of appeals make clear, Pomini did raise its arbitration defense **before** the ITC initiated an investigation. *See* Pet. App. A27 ("Institution of an investigation was objected to by [Pomini] on the basis of arbitration clauses contained in licensing agreements between the parties"); *id.* at A6 ("Although the Commission was informed of the pending district court action and Pomini's Motion To Compel Arbitration, the Commission decided to institute an investigation based on Farrel's allegations and did not reach the arbitrability issue, because that question was, according to the ITC investigating attorney, 'not presently before the Commission'"). In short, the court of appeals has created a trap for the unwary and then sprung that trap on Pomini, a party that took all appropriate steps to present, preserve and protect its contractual right to arbitration as the sole forum for dispute resolution. In these circumstances, the decision below not only erects a continuing bar to enforcement of arbitration agreements in international commercial transactions, but imposes a particular injustice on Pomini that will not be rectified unless the judgment of the court of appeals is reversed.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

Edward Kancler
Kevin H. Young
Mark A. Phillips
Benesch, Friedlander,
Coplan & Aronoff
1100 Citizens Building
850 Euclid Avenue
Cleveland, Ohio 44114
(216) 363-4500

Jerrold J. Ganzfried
Counsel of Record
Howrey & Simon
1730 Pennsylvania Ave., NW
Washington, DC 20006
(202) 783-0800

Tom M. Schaumberg
V. James Adduci, II
Adduci, Mastriani, Meeks
& Schill
1140 Connecticut Ave., NW
Washington, DC 20036
(202) 467-6300

Attorneys for Pomini
Farrel S.p.A. and
Pomini, Inc.

Dated: May 8, 1992